SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 353

WILLIAM E. HILBERT, JOSEPH MAUER, C. W. CURTIS and HARRY M. HOWELL, (a) as members, and as such, as representatives of Division No. 25 of the Grand International Brotherhood of Locomotive Engineers; and (b) as representatives of the General Committee of Adjustment of the Indiana Division of the Pennsylvania Railroad of the Grand International Brotherhood of Locomotive Engineers; and (c) as members, and as such, as representatives of the Grand International Brotherhood of Locomotive Engineers,

Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners respectfully move for leave to file the annexed Petition for Rehearing of the order of this Court,

entered on November 6, 1961, denying the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that this Court grant a Rehearing as to its Order of November 6, 1961, denying their Petition for Certiorari, and that a Writ of Certiorari issue to re-

view the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled action, as prayed for in their Petition for Certiorari filed herein on August 25, 1961.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

On November 6, 1961, the Court entered in this case the following order:

> "The petition for writ of certiorari is denied. The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan are of the opinion certiorari should be granted."

Rehearing is sought on the substantial ground, *available to Petitioners although not previously presented*,[1] that the matters presented in the Petition for Certiorari are national in scope and character, and of substantial importance to the jobs, homes, and families of several hundred thousand railroad employees, working under the Railway Labor Act in many cities and towns throughout the United States,[2] although the instant Petition sought relief only for approximately 100 locomotive engineers in Terre Haute, Indiana.

Petitioners sincerely suggest that they do not want to be presumptuous at this time, but it could be that three of the Honorable Justices of this Court did consider the matters presented in the Petition for Certiorari to be national in

1. Rule 58(2) of the Revised Rules of the Supreme Court of the United States (Adopted April 12, 1954, effective July 1, 1954), 346 U. S. 945, 98 L. ed (Court Rules) 44-5; Rule 58(2), U. S. C. A. (Supp. 1960); *Schriber-Schroth Company* v. *Cleveland Trust Company* (1938), 305 U. S. 47-50, 59 S. Ct. 8-9.

2. Respondent's Brief herein (p. 8, *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers*, 188 F. Supp. 721-727) indicates already, still another case (train runs between Ogdensburg, N. Y. and Alburg, Vt.) in which the *same identical* "Section 6 Notice" of November 2, 1959 has become involved with a subsequent change by another railroad of working conditions.

scope and character and of substantial importance to all the employees in the railroad industry; and if such be true, perhaps the Court could perforce at this time reconsider this proceeding in the light of its true national character and substantial importance to the thousands of railway workers in America today.[3]

Although Petitioners did not do so, nevertheless, Respondent in its Brief herein,[4] did point out the national scope and character of the issues before this Court, wherein Respondent asserted:

> "Both courts below found that the fact that the Respondents, acting under Section 6 of the Railway Labor Act, served on the Brotherhood of Locomotive Engineers a general notice for revision of the agreements covering the employment of engineers, including certain proposals as to changes in home terminals, had no relevance to the present dispute, which did not arise until April of 1960. *The Section 6 notices in question were served incident to a national movement now under way for a general revision of operating employes collectively* bargained agreements (Affidavit of J. J. Maher, paragraph 10 and Appendix F) (P. A. 40-41, 70-81, especially page 78."[5] (Our italics.)

The Affidavit[6] of said J. J. Maher, which was filed in support of Respondent's "Motion To Dismiss Or For Sum-

3. "For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." Testimony of Justice Van Devanter in Hearings before Senate Committee on the Judiciary on S. 2060 and 2061, 68 Cong., 1st Sess., p. 29 (1924).

4. Page 13 of Respondent's Brief.

5. *Ibid.*

6. P. A. 39-81 (Reference to "Appendix of Plaintiffs-Appellees" as filed with the United States Court of Appeals for the Seventh Circuit, No. 13203, copies of which have been filed with this Court by Petitioners.

mary Judgment",[7] in treating the said "Section 6 Notice", its import and effect in relationship to the issues involved, did specifically, clearly, and profusely set forth statements as to the complete national scope and character, and obvious substantial import, not only to Respondent and its employees, but to *all* Class I *railroads* and the *thousands of engine and train service employees* of said railroads.[8]

Should so many employees engaged in the railroad industry be literally legally abused by the well known "*long-delayed decisions*"[9] of the Railroad Adjustment Board without having some recourse to this Court?

Should so many employees in the railroad industry be subject to discharge "*from positions long held*"[10] by them, "*and the dislocation of others from their homes*"[11] without some recourse to this Court? In so far as these railroad employees are concerned, the time to seek and find their

7. P. A. 38.

8. "On November 2, 1959, defendant served on the Brotherhood of Locomotive Engineers, as representative of engineers employed by defendant, a notice of its desire for a general revision of existing agreements which, if adopted, would have the effect of revising Regulation 5-P-1 among other provisions of the presently effective agreement. A true copy of said notice is attached hereto and made a part hereof as Appendix 'F'. A notice in identical terms was served by defendant on its employes as represented by the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, namely firemen, hostlers and train service employes. On information and belief, similar notices were served by all of the Class I railroads of the United States on the representatives of engine and train service employes. This notice was served as part of a national movement by the Class I carriers for a general revision of working rules and agreements covering engine and train service. * * *." P. A. 40-1.

9. "To fulfill its function the *District Court must* also *consider* the *hardships*, if any, *that* would *arise if* the *employees* were *required to await* the *Board's* sometimes *long-delayed decisions* without recourse to a strike." (Our italics.) 363 U. S. 528-534.

10. 363 U. S. 528-534.

11. *Ibid.*

legal answer is now, not five or more years hence, from a Board and at a time when even a victory by said employees "*would be but an empty victory*"[12] wholly inadequate, for "*it might well be impossible to make them whole in any realistic sense.*"[13]

It will be manifestly impossible for Petitioners, and the thousands of other railway employees in the same *dubious predicament*, if they should be successful before the National Railroad Adjustment Board, to correct hardships already endured; nor could payments of money by Respondent be adequate or *realistic*[14] compensation. Monetary benefits can not make up for the objectionable changes in working conditions, loss of runs, loss of jobs, loss of seniority rights, suffered by railway employees for years, and perhaps forever. It can be stated without fear of contradiction, that railway employees can not be adequately compensated by the Board for the years that they may be prevented from working at their place of residence and their long established Home Terminals.[15]

In the instant case, and undoubtedly there are many similar ones now in the process throughout the United

12. *Ibid.*

13. "It is not difficult to perceive how the conditions imposed in this case could be deemed to serve to protect the jurisdiction of the Board. The *dispute* out of which the judicial controversy arose does not merely concern rates of pay or job assignments, but rather *involves* the *discharge of employees from positions long held* and *the dislocation of others from their homes. From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense.* If this be so, the action of the district judge, rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the unions' favor would be but an empty victory." (Our italics.) 363 U. S. 528-534.

14. *Ibid.*

15. *Ibid.*

States,[16] Respondent posted the *Notices* and *Advertisement Bulletins*, and arbitrarily directed that they would take effect just eight (8) days thereafter; Petitioners attempted to present a dispute as to such; Respondent summarily and arbitrarily denied that a dispute could exist, and refused to negotiate thereon; such was a violation of the Act on the part of the Respondent; Petitioners could not go to the Adjustment Board, "because the issue was not ripe for presentation to it."[17]

"Here the dispute was only a few days old when" the *radical changes* in conditions of employment, *loss* of numerous jobs, etc., were to take place at Terre Haute, "and neither party could go to the Board".[18]

All that Petitioners sought in the District Court was injunctive relief "to prevent the frustration of the statutory grievance-adjustment procedure".[19]

The nature of the rights of Petitioners, *and all other railway employees*, is such that unless they are protected before the *drastic changes* take place, no adequate future remedy can be provided them.[20]

No agency under the Railway Labor Act is empowered to give injunctive relief tantamount to that which may be ordered by a District Court in imposing reasonable *status quo* provisions.[21]

This Court has long decided that injunctive relief may be granted to vindicate the processes of the Railway Labor Act, and that a District Court has the jurisdiction and power to issue necessary injunctive orders to enforce com-

16. *Supra*, note 2.
17. 252 F. 2d 149-153.
18. *Id.* at 154.
19. *Ibid.*
20. 363 U. S. 528-534.
21. *Ibid.*

pliance with the requirements of the Railway Labor Act, notwithstanding the provisions of the Norris-LaGuardia Act.[22]

As recently as June 19, 1961, the Court reiterated the principle that the Federal Courts have authority "to enjoin compliance with various mandates of the Railway Labor Act".[23]

It is also now well decided by the Court, that even in the instance involving a "minor dispute", a railroad may obtain injunctive relief against a strike by a union and its members, pending the adjudication of such a dispute before the National Railroad Adjustment Board, *and that in the process*, a District Court may condition the injunctive relief upon the railroad maintaining the *status quo*.[24]

Petitioners, and thousands of other similar railway employees, earnestly believe that it should make no difference in the Federal Courts, in proceedings involving interpretation of the Railway Labor Act, as to whom might be the plaintiff or defendant; or to be more specific, it should make no difference under the law, in so far as the Railway Labor Act is concerned, as to whether a railroad or a union comes into court as a plaintiff; the law should be equal to all, and discriminatory as to none.

If a railroad is entitled to enjoin *self-help*[25] in the form of a strike on the part of union, wherein a minor dispute is involved, then a union should be permitted into the same Court and obtain similar injunctive relief, where a minor dispute is involved, if a railroad has violated the statutory provisions of the Act, as flagrantly done by the Respondent

22. 353 U. S. 30-41-2.
23. 367 U. S. 740; 6 L. ed. 2d 1141-1163.
24. 363 U. S. 528.
25. *Supra*, note 17.

in this case,[26] the Respondent to the contrary notwithstanding.

As further pointed out by the Court in a recent decision, a *primary purpose* of the major revisions to the Railway Labor Act in 1934 was to further the basic congressional

26. In the last paragraph on page 4 of Respondent's Brief herein, it is stated: "Petitioners' Statement of Facts in their present brief (p. 13) is to the effect that Petitioners attempted to raise or list a dispute with Respondent concerning its proposed action but that Respondent refused to permit any dispute to be processed." Respondent then proceeds to cleverly and quite deceptively recite that the applicable agreements between the parties provide an established method for the processing of grievances and that "No attempt was made by Petitioners to progress the present dispute under the existing grievance procedures * * * although Petitioners have a right to do so * * *." With all due deference to the Court, such a clever and deceptive statement on the part of Respondent, may have had a tendency to mislead the Court as to the actual facts. It will be observed, that Respondent never actually denied at any time the categorical statements of Petitioners on pages 12 and 13 of their Petition herein, wherein it was clearly and unequivocally stated:

"When Respondent issued the aforesaid Notices and Advertisement Bulletins in February and March of 1960, Petitioners, both orally and in writing, attempted to *raise* and *list* a dispute with respect thereto under an agreement between the parties (Appendix E attached to Affidavit of J. J. Maher; P. A. 67-69), but Respondent summarily, arbitrarily, and unilaterally took the position that there could be no dispute *raised* or *listed* as to such Notices and Advertisement Bulletins, for according to Respondent, it had the *absolute* right to take such action exclusive of Petitioners, and that negotiation with respect thereto was not required under the Railway Labor Act. (P. A. 101.)"

"Petitioners also attempted to *raise* or list a dispute and voice disapproval of the arbitrary, unilateral and summary action by Respondent in the posting at Terre Haute of the aforesaid *new* Notices and Advertisement Bulletins on April 18, 1960, to take effect just eight days later on April 26, 1960, but Respondent steadfastly refused to recognize that any dispute could or did exist between Petitioners and Respondent, and refused to negotiate thereon. (P. A. 101-102.)"

"Petitioners made every effort to present a dispute to Respondent, but the railroad would not recognize that any dispute could exist, and refused to permit any dispute to be processed. (P. A. 102.)"

The affidavits of J. J. Maher (P. A. 39 and P. A. 82) were sub-

policy of self-adjustment of the problems between labor organizations and the carriers.[27]

Respondent has violated the basic congressional policy of the Railway Labor Act, as well as specific provisions thereof, by arbitrarily and summarily refusing to permit

mitted by Respondent on June 10, 1960 and July 5, 1960, in support of its "Motion To Dismiss Or For Summary Judgment" (P. A. 38); the affidavit of Hilbert (P. A. 87) was filed on behalf of Petitioners on July 15, 1960; thereafter, Respondent was authorized by order of the District Court (R. 322-3) to file a "counter supplemental affidavit", and thereby permit a challenge of the facts presented by Petitioners, but Respondent declined to do so.

The above was not the only instance of a clever and deceptive presentation of the facts to the Court; on page 3 of their Brief herein, Respondent stated: "Indianapolis has for many years been an established home terminal for road, train and engine crews as has Terre Haute. (Affidavit of J. J. Maher, par. 4; P. A. 39.)"

The above statement is not a fair and correct one in light of the facts in the instant case: Indianapolis may have been an established Home Terminal for some road, train, and engine crews of Respondent, but Indianapolis has *never* been the Home Terminal of the locomotive engineers involved in this proceeding, for they have had their Home Terminal at Terre Haute for many years last past (P. A. 93), and have an agreement providing that Terre Haute shall be their Home Terminal. (P. A. 92-93.)

In still another instance on page 2 of its Brief, Respondent would tend to lead one to believe that it had always operated trains from Indianapolis to East St. Louis and therefore there should be no question raised on the part of Petitioners; however, the actual facts are that Respondent operated its trains, by locomotive engineers, not from Indianapolis to East St. Louis, but from Terre Haute to Indianapolis, then back to Terre Haute, and, from Terre Haute to East St. Louis, and from there back to Terre Haute. (P. A. 91-2.)

Again on page 3 of Respondent's Brief, it asserts as a fact: "Respondent determined that by arranging its freight and passenger service between Indianapolis and East St. Louis to be operated by engineers having their home terminal at Indianapolis, payment for the 22 miles not actually run would be eliminated and that the operation would be made more efficient by virtue of the elimination of a stop at Terre Haute for the purpose of changing crews." Such so-called facts are not in the record in the instant case; perhaps Respondent could have made the above statement by means of deduction in its argument, but the same has no place in Respondent's "Statement Of The Case" specifically entitled "Facts".

27. 367 U. S. 740; 6 L. ed. 2d 1141-1155.

Petitioners to present a dispute to its representatives for voluntary adjustment, and also by refusing steadfastly to negotiate with respect thereto.[28]

In their Petition for Certiorari, Petitioners brought to the attention of the Court "footnote 3" in the *Missouri-Kansas-Texas* case, *supra* (1960);[29] the Court indicated in said "footnote", that it had not decided in the *Chicago-River* case (1950),[30] nor was it deciding in *Missouri-Kansas-Texas* that a federal court could enjoin a carrier from effectuating changes giving rise to a dispute independently of a suit for equitable relief by a railroad. And, as petitioners pointed out, they are seeking, among other things, a decision to such question; it is an important question to the thousands of railway employees in this country; it is without doubt of national scope and character.

Such question should not only be decided by the Court at this late date, but the decision should be favorable to Petitioners in the instant case.

Petitioners reiterate with all sincerity, that a railroad should not be entitled to any more relief under the Act than a union and its members; if a railroad is entitled to injunctive relief, then *a fortiori*, a union should likewise be entitled to injunctive relief, especially in a situation as in the case at bar, wherein the Respondent railroad, on extremely short notice, arbitrarily determined that many jobs were to be abolished, many long existent conditions of employment were to be changed, that new jobs were to be created, new working conditions were established, and, in violation of the Railway Labor Act, Respondent refused to negotiate with respect thereto.[31]

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28. *Ibid.*
29. 363 U. S. 528-531.
30. 353 U. S. 30.
31. *Supra*, notes 26, 27, and 28.

And, again Petitioners respectfully reiterate, that if injunctive relief can not be granted Petitioners, it might just as well be stated *as a matter of law*, that in order for a union to obtain relief comparable to that which can be secured by a railroad, a union must perforce take the law into its own hands, so to speak, by going on strike, thereby requiring a railroad to seek injunctive relief, and thereafter in the process, the union is required to beseech the court to condition the injunction upon maintenance of the *status quo*.

Petitioners do not believe the law, as promulgated by the Court, to be so harsh or unfair.

In addition to all of the above, Respondent took the initiative to issue the said "Section 6 Notice" of November 2, 1959, in conjunction with *all* Class I railroads on a national scope,[32] and sought thereby on a wholesale basis in conjunction with *all* Class I railroads to eliminate *all agreements*, not only with Petitioners, but with *all* unions representing the thousands of engine and train service employees.[33]

Shortly thereafter (February, March, and April of 1960) Respondent sought to do some of the same identical things on a local basis at Terre Haute.

In spite of the "Section 6 Notice", and regardless of the fact that Petitioners and Respondent were still negotiating with respect thereto, Respondent issued *new* notices at Terre Haute, thereby altering *rules or working* conditions in violation of the *status quo* provisions of the Railway Labor Act.

Respondent was not the only railroad that did such, as can be verified by Respondent's Brief herein.[34]

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32. *Supra*, note 8.

33. *Ibid.*

34. *Supra*, note 2.

Petitioners' claim for relief herein, is not an isolated one coming toward this Court.[35] Such represents a problem national in scope and character, and it is respectfully submitted that this problem should now be decided for the benefit of all railroad employees.

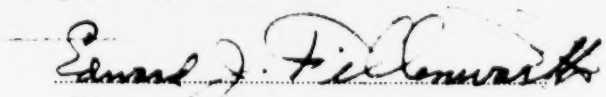
The railroads of this country shrould not be permitted to issue a *national* "Section 6 Notice" to *all* unions, and then proceed to violate the *status quo* provisions of the Act, by initiating in a summary, arbitrary, and unilateral fashion, a similar or identical notice on a local level as was done at Terre Haute.

Under the basic congressional policy of the Railway Labor Act, the specific provisions of the Act and equitable principles, Petitioners should have been entitled to injunctive relief.

CONCLUSION.

For the reasons set forth above, it is respectfully urged, and Petitioners earnestly beseech the Court, that a Rehearing be granted as to its order of November 6, 1961, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled action.

Respectfully submitted,



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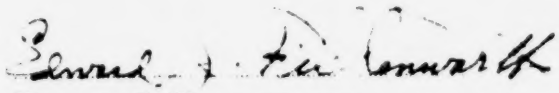
35. *Ibid.*

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court.



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